M KULA SEGARAN A

v.

DATUK SERI ABDUL WAHID OMAR & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
ZALEHA YUSOF J
[JUDICIAL REVIEW NO: 25-132-06-2013]
30 JULY 2013

CONSTITUTIONAL LAW: *Constitution - Federal Constitution - Appointment of Ministers and Deputy Ministers - Whether sworn in pursuant to art. 43A(1) Federal Constitution - Whether Minister and Deputy Minister members of Parliament - Whether appointment regularly performed - Whether appointment valid - Evidence Act 1950, s. 114(e)* C

CIVIL PROCEDURE: *Judicial review - High Court - Appointment of Ministers and Deputy Ministers - Whether sworn in pursuant to art. 43A(1) Federal Constitution - Whether Minister and Deputy Minister members of Parliament - Whether appointment regularly performed - Whether appointment valid - Federal Constitution, arts. 43(2) & 59(1)* D E

This was an *ex parte* application pursuant to O. 53 r. 3 of the Rules of Court 2012 ('ROC') by the applicant to commence judicial review proceedings. The orders sought, *inter alia,* were that the first respondent (Datuk Seri Abdul Wahid Omar) and the second respondent (Datuk Paul Low Seng Kuan), and the third respondent (Waythamoorthy Ponnusamy) and the fifth respondent (Ahmad Bashah Md Hanipah) were not entitled to hold positions of Ministers and Deputy Ministers respectively under art. 43(2) of the Federal Constitution. It was argued that (i) the respondents did not stand at any Parliamentary constituency elections during the general elections on 5 May 2013 but were appointed as Ministers and Deputy Ministers on 15 May 2013; and (ii) their appointments were null and void and of no effect. The applicants contended that the appointments were unconstitutional as the respondents were not members of either House of Parliament as they were yet to be sworn in pursuant to art. 43A(1) of the Federal Constitution. On the contrary, the Attorney General ('AG') objected to the application on the grounds that the application was frivolous and did not disclose an arguable case F G H I

A that justified argument on a substantive motion. The AG cited art. 59(1) of the Federal Constitution which stated that a person must be a member of the Senate before he took oath and the oath must be taken by a member after his election or appointment as a member of the Senate as provided in the 6th Schedule. The issues
B that arose for consideration were, *inter alia*, (i) whether the respondents were members of Parliament at the material time; and (ii) whether being members of Parliament, the respondents were required to be sworn in before their appointment as Ministers and Deputy Ministers.

C

Held (dismissing application):

(1) Constitutionally, a person becomes a member of the Senate either by being appointed by the Yang di-Pertuan Agong or by being elected by the respective State Legislative Assemblies.
D There was nothing in the affidavit of the applicant which showed that the Yang di-Pertuan Agong had not made the appointment. Since there was no evidence to the contrary, the court presumed that the appointments had been regularly performed as provided by s. 114(e) of the Evidence Act 1950.
E (para 8)

(2) There is no provision in the Federal Constitution which prevents appointment to the Senate before the appointee takes his oath. On the contrary, cl. 1 of art. 59 of the Federal
F Constitution and the wording in the 6th Schedule imply that a person has to be appointed first before he can take his oath or swear in. The only restriction is that until he takes his oath, he cannot take his seat and subscribe before the President of the Senate. (para 10)

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(3) A Minister could be appointed provided that he does not exercise his function before he takes his oath of office pursuant to cl. 6 of art. 43. Therefore, the appointment comes first and the taking of oath comes later. Since the ground of
H this application was that the respondents had not been sworn in prior to their appointment, the application for judicial review was dismissed as there was no arguable case that justified argument on a substantive motion. (paras 11 & 12)

I

Case(s) referred to:

Mohd Nordin Johan v. The Attorney-General, Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 FC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 56, 102, 103, 114(e)
Federal Constitution, arts. 43(2)(b), 43A(1), 45, 59(1)
Rules of Court 2012, O. 53 r. 3(3)

For the applicant - Kula Segaran V Murugesan (Kengadharan Ramasamy, Sivanesan Achuandan & Poninusamy Kalaichelvan with him); M/s A Sivanesan & Co

For the respondents - Abdul Gani Patail; Attorney General (Amarjeet Singh & Suzana Atan; SFC's with him)

Reported by Sandra Gabriel

JUDGMENT

Zaleha Yusof J:

[1] This is an *ex parte* application pursuant to O. 53 r. 3 of the Rules of Court 2012 by the applicant, to commence judicial review proceedings for the following orders:

(a) a declaration that the first and second respondents are not in law entitled to hold the position of Ministers under art. 43(2) of the Federal Constitution and as such their appointments on 15 May 2013 are null and void and of no effect;

(b) a declaration that the third to the fifth respondents are not in law entitled to hold the position of Deputy Ministers under art. 43A of the Federal Constitution and as such their appointments on 15 May 2013 are null and void and of no effect;

(c) that each of the respondents refund all emoluments, privileges and other pecuniary advantages obtained by them to the Government of Malaysia within seven days of the date of the order made herein;

(d) a declaration that all acts done by or under the purported authority of the respondents are null and void and of no effect.

[2] The application was served on the Attorney General's Chambers pursuant to O. 53 r. 3(3) of the Rules of Court 2012 and the Attorney General has now come to this court to oppose the application.

Applicant's Case

[3] It is a known fact that the respondents did not stand for elections at any parliamentary constituency during the recent general election held on 5 May 2013. However on 15 May 2013, they were appointed as Ministers and Deputy Ministers respectively. Under art. 43(2)(b) of the Federal Constitution of Malaysia, Ministers must be appointed from among the members of either House of Parliament. Likewise, under art. 43A(1) of the Federal Constitution of Malaysia, Deputy Ministers must be appointed from among the members of either House of Parliament. It is the applicant's argument that the appointment of the respondents as Ministers and Deputy Ministers respectively are unconstitutional as at the time of their appointment on 15 May 2013, they were not members of either House of Parliament as they were yet to be sworn in.

Attorney General's Objection

[4] The Attorney General objects on the ground that the application is frivolous and does not disclose an arguable case that justifies argument on a substantive motion. The Attorney General argues that the applicant's point is based on words that do not exist or words that he himself has added to the said articles. The Attorney General cites art. 59(1) of the Federal Constitution that states a person must be a member of the Senate first before he takes his oath and 'the oath' to be taken as provided in the Sixth Schedule shows that the oath is taken by a member after his election or appointment as a member of the Senate.

Decision

[5] Both parties ie, the applicant as well as the Attorney General, filed in their written submissions and neither made oral submissions. I have scrutinized the cause papers and considered these written submissions.

[6] The relevant provisions of the Federal Constitution pertaining to the issue at hand are as follows:

Article 43(2)(b)

He (Yang di-Pertuan Agong) shall on the advice of the Prime Minister appoint other Menteri (Ministers) from among the members of either House of Parliament.

Article 43(6)

Before a Minister exercises the functions of his office he shall take and subscribe in the presence of the Yang di-Pertuan Agong the oath of office and allegiance and the oath of secrecy set out in the Sixth Schedule.

Article 43A(1)

The Yang di-Pertuan Agong may on the advice of the Prime Minister appoint Deputy Ministers from among the members of either House of Parliament.

Article 45(1)

Subject to Clause (4), the Senate shall consist of elected and appointed members as follows:

(a) two members for each State shall be elected in accordance with the Seventh Schedule; and

(aa) two members for the Federal Territory of Kuala Lumpur, one member for the Federal Territory of Labuan and one member for the Federal Territory of Putrajaya shall be appointed by the Yang di-Pertuan Agong; and

(b) forty members shall be appointed by the Yang di-Pertuan Agong.

Article 59(1)

Every member of either House of Parliament shall before taking his seat take and subscribe before the person presiding in the House an oath in the form set out in the Sixth Schedule,...

Sixth Schedule

I, ... **having been elected (or appointed)** as a member of the House of Representatives (or the Senate) **do solemnly swear** (or affirm) that I will faithfully discharge my duties as such to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution. (emphasis added)

[7] The grounds of this application as stated in paras. 9 and 10 of the applicant's affidavit in support is that the respondents were not members of either House of Parliament as they were yet to be sworn in as Senators prior to their appointment. Parties are bound by their pleadings and in this application that is the pleading of the applicant. The issue to be decided is therefore whether the respondents were members of parliament at that material time and whether being members of parliament, the respondents are required to be sworn in before their appointment as Ministers and Deputy Ministers.

[8] As the respondents were not elected in the general election, they have to first become members of the Senate before being appointed as Ministers and Deputy Ministers respectively. To attain the status as a member of the Senate, a person either falls within one of the three modes provided by cl. 1 of art. 45 of the Federal Constitution. The modes are as follows:

(i) two members for each State shall be elected by the legislative assembly for that State in accordance with the Seventh Schedule;

(ii) two members for the Federal Territory of Kuala Lumpur, one member for the Federal Territory of Labuan and one member for the Federal Territory of Putrajaya shall be appointed by the Yang di-Pertuan Agong; and

(iii) 40 members shall be appointed by the Yang di-Pertuan Agong.

Therefore, constitutionally a person becomes a member of the Senate either by being appointed by the Yang di-Pertuan Agong or being elected by the respective State Legislative Assemblies. Although it is a known fact and in fact under s. 56 of the Evidence Act (Act 56), the court must take judicial notice of it that none of the State Legislative Assemblies had met at the material time to elect its respective representative to the Senate, there is nothing to stop the Yang di-Pertuan Agong from appointing the respondents as such. There is nothing in the affidavit of the applicant which shows that the Yang di-Pertuan Agong has not made the appointment. It is a mere statement of the applicant that the respondents were not members of the Senate at the time of the swearing in. The burden is on the

applicant to prove this. Refer to ss. 102 and 103 of Act 56. In fact the appointment being an official act, when there is no evidence to the contrary, the court may presume that it has been regularly performed as provided by s. 114(e) of Act 56.

[9] It is my view from the reading of the Federal Constitution, being appointed and taking oath are two different issues. Clause 2(b) of art. 43 and cl. 1 of art. 43A talk about appointment of Ministers and Deputy Ministers respectively. Whereas cl. 1 of art. 59 and the Sixth Schedule deal with oath taking.

[10] Looking at the Federal Constitution there is no provision which prevents appointment to the Senate before the appointee takes his oath. On the contrary, cl. 1 of art. 59 and the wording in the Sixth Schedule imply that a person has to be appointed first before he can take his oath or swear in. The only restriction is that until he takes his oath, he cannot take his seat and subscribe before the President of the Senate.

[11] Similarly, a Minister can be appointed but as provided by cl. 6 of art. 43, he cannot exercise his function before he takes his oath of office. So the appointment comes first and the taking of oath comes later.

[12] The Federal Court in *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271; [1983] 1 MLJ 68 at p. 70, which was followed recently by the Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 at p. 492 had held that an application for judicial review may be refused if it is shown that it is frivolous and does not disclose an arguable case that justifies argument on a substantive motion. As I have said, the ground of this application is that the respondents have not been sworn in prior to their appointment. So, based on that and the reasons I have stated above, I agree with the Honorable Attorney General, that there is no arguable case in this application.

[13] The application for leave is therefore dismissed with no order as to cost.